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In the Supreme Court of the United States

..... TERM, 1964

No. 308

NICK CHOURNOS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

NICK CHOURNOS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ALTON MORRELL, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	14
I. The court below has decided an important federal question which has not been, but should be settled by this court.	15
II. The decision below is in conflict with decisions of this court.	15
III. The decision below is in conflict with decisions of other circuit courts.	22
IV. The decision below was arrived at through an erroneous interpretation and comparison of particular factual situations of cases already finally adjudicated by the Circuit Court of Appeals of the 10th Circuit.	24
V. The decision below is in conflict with Utah law.	28
Conclusion	29
Appendix	i

AUTHORITIES CITED

Cardozo "The Paradoxes of Legal Science," (1928) p. 3	36
James "Inroads on Old Tort Concepts," 15 NACCA L.J. 281, 290 (1955)	35
34 Texas L. Rev. 956 (1956), 25 Fordham L. Rev. 167 (1956), Notes	34

CASES CITED

American Exchange Bank of Madison v. United States, 257 F. 2d 938 (7th Circuit-1958) 23

Chournos v. United States, 193 F. 2d 321 (10th Circuit) 26

Dalehite v. United States, 346 U.S. 15 ..... 15, 16, 18

Fair v. United States, 234 F. 2d 288 (5th Circuit).. 23

Hall v. Bartholomew, 51 Utah 279, 169 P. 943..... 28

Hatahley v. United States, 351 U.S. 173 ....17, 18, 19

Indian Towing Co. v. United States, 350 U.S. 61 (1955) 16, 17, 19, 21

Jones v. Blythe, 33 Utah 362, 93 P. 994 28

Kunzler v. United States, 208 F. Supp. 79, 307 F. 2d 511 (10th Circuit) 27

Muniz v. United States, 374 U.S. 150 (1963).... 19, 20

Mower v. Olsen, 49 Utah 373, 164 P. 482 28

Oman v. United States, 179 F. 2d 738 (10th Circuit) 24, 25

Pierce v. United States, 142 F. Supp. 721 (DCED Tenn. 1955), 235 F. 2d 466 22

Powell v. United States, 233 F. 2d 251 (10th Circuit) 26, 27

Rayonier v. United States, 352 U.S. 315, 77 Sup. Ct. 374 (1957) 17, 18

Red Canyon Sheep Company v. Ickes, (CA DC) 98 F. 2d 308 34

Roe v. Lundstrom, 89 Utah 520, 57 P. 2d 1128.... 29

Rufino v. United States, 126 F. Supp. 132 23

Union Trust Co. of District of Columbia, et al. v. United States, 113 F. Supp. 80, 221 F. 2d 62 (1955) 22

Winter v. Turner, Utah 1929, 278 P. 816 28

REGULATIONS CITED

Code of Federal Regulations (The Federal Range Code) 161.1-161.9

161.1-161.9 5

161.5 5

161.6c 5

161.11 5

STATUTES CITED

Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq.

28 U.S.C., Sec. 1254(1) 2

28 U.S.C., Sec. 1291 2

28 U.S.C., Sec. 1346(b) 2, 3

28 U.S.C., Sec. 2671 et seq 3

28 U.S.C., Sec. 2680(a) 14, 15, 16, 17, 19, 20, 21, 26, 29, 35

Taylor Grazing Act of June 28, 1934, c. 856, 48 Stat. 1269, as amended, 43 USC, 315 et seq.

43 USC, Sec. 315 3

43 USC, Sec. 315a 3

43 USC, Sec. 315b ..... [redacted], 30

43 USC, Sec. 315m 4, 30

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Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals, Tenth Circuit, entered on April 28, 1964, reversing the judgments of the District Court of the United States for the District of Utah (R. 45, 86).

OPINIONS BELOW

The District Court did not write an opinion. Its Findings of Fact and Conclusions of Law appear in the Record at pages 34-45, 69-86. The opinion of the Circuit Court of Appeals has been forwarded by the Clerk of the above said Circuit Court directly to the Clerk of this Court.

JURISDICTION

The District Court entered its separate judgments for the Petitioners, respectively, and against the United States on April 3, 1963 (R. 45, 86). Notice of Appeal from that decision to the Circuit Court of Appeals was filed by the United States on May 3, 1963 (R. 46, 86). The jurisdiction of the District Court was invoked under the Federal Tort Claims Act, 28 U.S.C., Sec. 1346(b). Jurisdiction of the Court of Appeals rests upon 28 U.S.C. 1291. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether Government agents, purporting to act under the provisions of the Taylor Grazing Act, may, within a grazing district established under said Act, exclude petitioner livestock operators from a grazing area within which they own substantial acreages of grazing lands, which they cannot graze without grazing the intermingled public domain and then, without the consent of petitioners, allow and manage the use of the entire area by livestock belonging to third parties, and collect and keep the fees charged for said operations,

including the fees for the use of the petitioners' privately controlled range, without liability under the Federal Tort Claims Act, 28 USC 1346(b) and 2671 et seq.

STATEMENT

1. The cases were tried together before the District Court, by agreement of the parties, because of the similarity of the issues involved under the same statutes and regulations (R. 98-99).

2. Both cases involve the grazing by livestock of natural forage crops produced upon range lands within the State of Utah (Ex. 1). Chournos grazes sheep (R. 106) in the northwest corner of Northern Utah and the area involved here is Box Elder County (Ex. 1). Morrell grazes cattle within the southeast portion of the State in Emery and Wayne Counties (R. 248). Each area is within a Grazing District established and regulated by the respondent's agents and officers of the Bureau of Land Management, Department of the Interior, under the provisions of the Taylor Grazing Act, 43 USC 315 et seq. The Chournos area is within that District known as the Brigham City, Utah, or Utah No. 1 Grazing District (R. 132, Ex. 1), and the Morrell range is within the Price, Utah, or Utah No. 7 Grazing District (Ex. A).

3. The said Act (43 USC Sec. 315) authorized the Secretary of the Interior "in his discretion" to establish the said grazing districts from lands "chiefly valuable for grazing and raising forage crops," and in Sec. 315a to "make provision for the protection, administration, regulation, and improvement" of the public domain

within these districts, and "to regulate their occupancy and use," and "to provide for the orderly use — of the range."

4. Section 315b of the said Act authorized the Secretary of the Interior to issue permits to graze livestock on the range within the grazing districts he established, to certain persons found entitled under his rules and regulations, but provided a preference right in securing permits for the use of the public lands under said permits as follows:

> "Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. . . ."

5. As to lands not found suitable for inclusion and grazing management within a grazing district, Sec. 315m of said Act authorizes the Secretary to "lease any such lands for grazing purposes" and this section provides a similar preference in the leasing of the public lands to owners of contiguous lands as is necessary to permit proper use of the contiguous patented lands.

6. The petitioners each own or lease very substantial acreages of range or grazing lands (Ex. C, R. 9-10, 108, 169, 177) intermingled with and contiguous to public domain grazing lands within the respective grazing districts (Exs. A and 1) established by the Secretary of the Interior. It is impossible for either of the petitioners to make a "proper" or any use of their owned or leased lands without making a like and continuing grazing use

of the contiguous public domain grazing lands (R. 117, 135, 158, 160, 172, 180-81, 249). It is likewise impossible to graze the public domain lands without grazing the lands of the petitioners (R. 117, 135, 158, 160, 172, 180-81, 249). Only the petitioners have lands in this situation within the particular range areas involved (Exs. A and 1).

7. In managing the grazing use of the public domain within established grazing districts under the permits or licenses which the Bureau of Land Management agents issue, those Government agents manage and control the livestock and the manner of the utilization of the forage resource while the animals are grazing the Government range. Regulations promulgated by the Secretary of the Interior for this purpose, among others, are known as the Federal Range Code (Code of Federal Regulations, 161.1 to 161.19) and Section 161.11 particularly prescribes rules for the use of the range under licenses or permits. Under these rules, the Government's agents prevent use of the public range lands without a license or permit being issued to allow or cover that use, and provide and enforce the terms under which range may be grazed under a license. The Government employees, also, determine the number and class of livestock to graze the public range lands, and the season of each year that it shall be grazed. CFR 161.5.

8. In addition to the regular grazing licenses or permits which the Government agents issue for the grazing use of the public ranges, and upon which fees are charged, as is provided in the said Act and Code, Section 161.6c provides for the issuance of "exchange of use licenses" to any applicant having ownership or con-

trol of patented land interspersed and normally grazed in conjunction with the surrounding Federal range for not to exceed the grazing capacity of such non-Federal land, without payment of any grazing fees, and which gives to the Government "management and control of such non-Federal land for grazing purposes."

9. Petitioners have been in the livestock ranching business all of their adult lives (R. 248-9, 106), each operating substantial outfits, with Chournos owning about 120,000 acres of range lands (Ex. 1, R. 108) and operating 5,000 to 6,000 head of sheep, and Morrell had owned and operated about 1,000 head of cattle (R. 249) upon owned ranch lands in Wyoming and upon ranches and range lands in Utah (R. 248). For periods prior to the seasons involved here, the Government range managers had made arrangements with petitioners for the grazing use by others of their said lands, by allowing petitioners to graze within the area the number of livestock their intermingled privately controlled range would feed (R. 167, 169, 155, 160, 249). The livestock of petitioners then grazed the entire range in common with livestock owned by other livestock operators who neither owned nor leased range lands in the area, but who were granted the said fee-paying licenses and permits by the Government's agents to graze the area. The Government charged these other livestock operators for all the forage their livestock consumed from said area, because, under the exchange-of-use arrangement, petitioners were consuming from the area their proportionate part of the forage it produced. While these exchange-of-use arrangements were in effect, the Government agents were in complete charge of how and when the

livestock grazed the area since they had the entire acreage therein under their management and control, including the privately owned and leased lands of petitioners.

10. The Government's said agents and officers determined, however, to terminate allowing petitioners to have any use of the areas by reason of their ownership therein of these substantial acreages of range lands (R. 118, 135, 167, 169, 249) — Chournos owned 70,000 and leased approximately 20,000 acres (R. 108, Ex. 1), sufficient to feed 10,000 sheep for five months (R. 110-11, 113, 184, 215, 227, 234, 244-45), and Morrell leased approximately 25,000 acres (Exs. A, C, R. 9-10, 169, 177) which would feed about 500 cows with their calves for the period involved, or for five months (R. 117). Chournos owned approximately two-thirds of the area within which his lands are located and his lands produced this percentage of the total forage production of the entire area. The Government lands produced the other approximately one-third of the forage upon the remaining one-third of the acreage (Ex. 1, R. 110-11, 113, 185, 221). Morrell leased approximately 11 per cent of the range area and his lands produced that percentage of the total forage therein with the Government owning and controlling the remaining acreage and forage (Ex. A). The Morrell lands would adequately feed 500 head of cows with their calves for the five-month summer season of each of the three years involved in his case (R. 117).

11. Chournos acquired the part of his holdings involved here in about 1948, and the former owner of these lands, Southern Pacific Land Company, was recognized

under an agreement entered into with the Secretary of the Interior as being entitled to the exclusive use of the public domain lying within the exterior boundary of the lands they owned (Ex. 2, R. 301-6). The same cattlemen who grazed the Chournos lands involved here were, by the Bureau of Land Management agents, denied any use whatsoever of the public domain lands until they first leased or paid Southern Pacific Company for the use of its intermingled lands (Exs. 3, 4, 5, 6, 14, 15, 18, 19, R. 307-8, 309-10-11, 349-52, 354-56) while the said Company owned the lands, which had come to them from the Government many years ago as railroad grant lands and were granted in a checkerboard fashion with the odd-numbered sections being granted to the railroad (R. 186). Of the even-numbered sections, 2, 16, 32 and 36 in each township are owned by the State of Utah and leased by the State to Chournos (Ex. 1, R. 108). After Chournos acquired the lands, the Government, for a few years granted him an exchange of use license under which Chournos surrendered the management of his lands to the Government and was, in turn, allowed to graze within the area the number of livestock which his lands would support with their forage requirements (R. 155, 160).

12. By reason of the Chournos acquisition of these lands, the Government recognized him for the right to graze 1,795 head of sheep within the area for six months, or for 2,154 AUMs (R. 188). An AUM is the forage required to support one (1) cow or five (5) sheep for one (1) month (R. 108, 191). Chournos is unable to secure the said 2,154 AUMs from the area much less from the public domain therein because, depending upon

weather conditions, he grazes this area only about three to four months of each winter season, entering the area after December 1 and leaving by March 31 (R. 142, 234). He has other range land areas where he lambs his ewes in the spring, and has summer ranges to round out a year-long operation (R. 105) with 10,000 head of ewes. (R. 110-11, 113; 184, 215, 227). Even though Chournos grazes the area of range for shorter than the six months which it would be necessary for him to graze in order to consume the 2,154 AUMs with his operations limited to 1,795 sheep, the Government agents would allow him to graze no more than that number at any time (R. 188, 193-94, 211, 215). 1,795 head of sheep consume 1,077 AUMs in three months, 1,436 in four months, and 1,795 in five months. The Chournos owned and leased range alone produces almost five times the forage the Government would allow Chournos to remove from the entire area, and many more times the amount the said 1,795 sheep could consume from the public lands therein for the short period of time Chournos is able to spend in this range area. No matter the number of livestock grazing this area nor the length of time they graze it, about 65 per cent of the forage they consume comes from the Chournos lands and the other 35 per cent comes from the intermingled public domain (R. 110).

13. Knowing all this to be true, the Government agents, without regard to Chournos' wishes, gave the cattlemen, who operated their cattle upon the Chournos range each winter for the four years involved here, licenses to bring their cattle into the range area on October 15 (Ex. B, R. 356-7), one and one-half to two months prior to the time Chournos could enter the area,

and allowed them to keep the cattle there until May 1 (Ex. B), two months after Chournos had taken his livestock off the range. The said agents charged the cattlemen for all of the forage their cattle consumed from the area and collected and kept the full fees (R. 136, 215), with 65 per cent of it coming from the Chournos lands (Ex. 1). Chournos was able and ready, during all of the period involved here, to operate 10,000 head of sheep and was prevented from operating them by these acts of the Government's agents in selling his forage to third persons and denying him an opportunity to graze it, R. 235). Chournos endeavored to graze the area with more than the 1,795 sheep but was promptly and continuously trespassed by the Government's agents for trying to secure his own forage (Ex. 11, R. 199, 213-14, 215, 317-18).

14. Morrell was denied any right to place any cattle within the range area under any conditions (R. 167, 169, 249). But for the same season that Morrell desired to graze his 400 cows (the summer season), the Government placed therein the cattle of others, so that they consumed all of the Morrell forage (R. 116, 170-72, 178, 220, 249, 253, 295-6) and brought trespass proceedings against Morrell (Ex. 8, R. 312-15).

15. Each of the petitioners had regularly applied to the Government for the grazing use of the public domain within the areas in which their own lands are located, and had offered to surrender the management and control of their lands to the Government, upon being allowed to graze the area with substantially the number of animals their lands would feed (R. 167, 169,

249, 215). The agents of the Government totally rejected these applications because they advised petitioners that the Government had allowed third parties to graze these lands with all the livestock the range would support (R. 215, 249).

16. The cattle operators consumed 70 per cent of the forage the west half of the Chournos lands produced and 50 per cent of the forage produced upon the east half of his lands (R. 181, 246-47), or roughly 60 per cent of his forage, or 6,000 AUMs, sufficient to graze 6,000 sheep for five months, 7,250 head for four months, or 10,000 head for three months, for which Chournos received no compensation whatsoever (Ex. B, R. 136, 146-7, 211, 282). The choice of the forage of the Chournos lands was consumed by the said cattle before his limited number of sheep arrived in the area each fall (R. 140), and in important areas of the Chournos range where the forage was best and around water holes, the cattle consumed all of that forage (R. 114).

17. The Morrell cattle were forced off the range (Ex. 8, R. 250, 312-15), and the Government agents notified the insurance companies who held mortgages upon each of these outfits that the Government was in the process of prosecuting the petitioners for having had livestock upon public domain without any license having been issued. The mortgagee in the Morrell case began foreclosure proceedings and the Morrell outfit was liquidated (R. 250-51, 254-8). Chournos was not faced with foreclosure, but his operations have been substantially reduced by reason of the fact that the Government agents sell the Chournos forage to third parties,

while threatening Chournos with trespass if he tries to secure his own forage.

18. In both the Morrell range area and in that of Chournos, the Government agents extend year-long licenses for the use of the public domain to these other livestock operators who were brought in, under license, to graze the range (R. 116). The cattlemen involved in the Chournos area have their own checkerboard range lands and their hay-producing ranches upon ranges immediately adjacent on the north to the Chournos range (R. 115-16, 138). They alone graze their own range and the public domain intermingled therewith in the summer months, and then graze the Chournos lands in the winter season. Chournos owns a small acreage of lands within the said summer unit, which is otherwise owned by the cattlemen and the Government, but his application to graze in that area was denied by the Government for the reason that he could not graze the public domain in that area without trespassing upon the cattlemen's privately owned lands in that area. Chournos stayed out of the area.

19. In the Morrell area, too, the Government collected and kept fees from the other cattle operators for the forage produced upon the Morrell lands. These other cattle operators were charged for all the forage their animals grazed, exactly as was done in the Chournos area (R. 117, 220, 249).

20. In areas outside of this District, the Bureau of Land Management issues licenses for the use of the public domain intermingled with privately owned range lands only to the owners of those lands (R. 138-39, 216,

218). This procedure is also followed in other areas of the Chournos district (R. 137-38, 140), and anyone not owning private range lands in such area has been required to first make arrangements with the party owning such range (Ex. 6, 2, R. 142-43, 310-11).

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

II

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

III

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.

IV

THE DECISION BELOW WAS ARRIVED AT THROUGH AN ERRONEOUS INTERPRETATION AND COMPARISON OF PARTICULAR FACTUAL SITUATIONS OF CASES ALREADY FINALLY ADJUDICATED BY THE CIRCUIT COURT OF APPEALS OF THE 10TH CIRCUIT.

V

THE DECISION BELOW IS IN CONFLICT WITH UTAH LAW.

REASONS FOR GRANTING THE WRIT

The decision below found the respondent to be exercising a discretionary function under Sec. 2680(a) of the Federal Tort Claims Act, while acting within the scope of authority as conferred upon them by the Taylor Grazing Act, in granting grazing use of a range area to third parties which foreseeably and intentionally meant the grazing of petitioners' substantial intermingled land holdings, and while preventing petitioners from use of the areas.

To the extent that this decision has found such acts of Government employees to be within the discretionary function provision, it gives rise to an important Federal Question involving the proper interpretation and application of Section 2680(a) of the Federal Tort Claims Act, which has not, as to the particular circumstances here involved, been decided by this Court; and ought to be so resolved. Further, the decision below is in direct conflict with decision of this Court and with decisions of other Circuit Courts. It is predicated on an erroneous interpretation of particular cases finally adjudicated in the 10th Circuit Court of Appeals. It is in direct conflict with Utah law. The decision below is not in compliance with the trend nor the status of the law as such exists today with regard to this particular provision of the Federal Tort Claims Act.

I

THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The Federal Question to be resolved involves a proper interpretation of Section 2680(a), the discretionary function exception of the Federal Tort Claims Act, and its applicability to the particular factual situation here involved. It appears that several cases, with closely analogous factual situations, presenting the question as to what constitutes an act of discretion under Section 2680(a), have been brought before and decided by this Court. See infra Part II.

II

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Prior to 1953, and since that time, the various courts have been concerned with the problem of where to draw the line between those acts which involve discretion and planning and those which are merely on the operational level. Much confusion has arisen as a result of the ambiguities of Section 2680(a) of the Federal Tort Claims Act.

In the *Dalehite vs. United States* case, 346 U.S. 15 ,a situation involving the Texas City Disaster of 1947, decided by this Court in 1953, a very broad interpretation as to what constitute a discretionary function under

Section 2680(a) was set forth. The Court pointed out that:

> "Where there is room for policy judgment and decision there is discretion."

In more recent decisions, this Court has modified and limited the rule as to what constitutes an act of discretion within the scope of Section 2680(a), as that rule was set forth in the *Dalehite* decision. This departure can be illustrated by the following decisions:

In the *Indian Towing Co. vs. United States* case, 350 U.S. 61, decided by this Court in 1955, the first notable departure from the trends implicit in the *Dalehite* case was taken, when the Court here granted recovery to the claimant. The Court here, following the purpose hebind the enactment of the Federal Tort Claims Act, narrowed the scope of the *Dalehite* interpretation when it held that where the United States undertakes to supply lighthouse service, it must exercise reasonable care, and its failure to do so will subject it to liability under the Act, thus inferring that the exception as provided under Section 2680(a) ceases when it is determined to supply the service. It was held there that the failure of the subordinates, Government agents, to act and to give warning to others of a *known dangerous* condition was a breach of duty owed to others. The Court here further departed from the approach in the *Dalehite* case when it pointed out that:

> "Congress did not intend the Act to be self-defeating by adopting the specious distinction found in the test applied in Dalehite."

The Court further pointed out that since the agents in charge of the manufacture and shipment of the ferti-

lizer in the *Dalhite* case were under no less an obligation than the agents in the *Indian Towing Co. vs. United States* case, supra. The decision in the *Indian Towing Co.* case seems to be a fairer interpretation of the extent of the "discretionary function" exception. This same exception is applicable to the Chournos and Morrell cases here involved. The Government agents, once having decided to establish a grazing district and to manage the grazing use of the public lands, as to these particular areas, were, from that point on, under a duty to exercise reasonable care.

The decisions handed down by this Court in *Rayonier vs. United States*, 352 U.S. 315, 77 Sup. Ct. 374 (1957), and *Hatahley vs. United States*, 351 U.S. 173, illustrate that the decision rendered in the *Indian Towing* case has been followed and that decision has been broadened since that time.

The court below erred in holding that the interpretations of Section 2680(a), as set forth by this Court in the *Rayonier* and *Hatahley* cases, were not applicable to the Chournos and Morrell cases.

The issue, as to what constitutes acts of discretion within the ambit of Section 2680(a), before this Court in the *Rayonier* and *Hatahley* situations, seems applicable to the instant cases.

In *Rayonier vs. United States*, supra, decided by this Court in 1957, it was stated that:

> "The very purpose of the Tort Claims Act was to waive the Government's traditional all encompassing immunity from tort actions and to establish novel and unprecedented governmental lia-

bility. There is no justification for this court to read exemptions into the Act beyond those provided by Congress."

In *Rayonier,* negligence was charged to the United States Forest Service for failure to guard against or properly fight forest fires ignited on Government land in the State of Washington. The Court was not impressed with the argument that discretionary functions were involved. Both the District Court and the Court of Appeals had relied upon *Dalehite* in dismissing the claims. Justice Black's majority opinion further pointed out that the fact that private persons do not customarily carry on the negligently performed work is not to be the decisive factor, but rather if state law would enforce liability on private persons or corporations under similar circumstances, liability will be imposed against the Government where a wrong has been committed. In the *Rayonier* case, acts of negligence occurring upon public land were involved, whereas in the cases at bar, the Government agents acted with foresight, knowledge and intent that trespass upon the petitioners' privately controlled lands would certainly occur. Since there was an obligation and a duty to control the fire in the *Rayonier* case so that private lands would not be burned, there was a duty in the Chournos and Morrell situations not to intentionally aid and abet a trespass and to collect fees for all forage consumed from petitioners' lands. For its failure to take care of the livestock, which it alone was responsible for placing upon the range areas involved, the Government appears liable.

In the *Hatahley vs. United States* case, supra, the question was involved as to rights of Bureau of Land

Management agents to take and destroy private property (horses) found upon public lands. The Government agents in the *Hatahley* case knew to whom the horses belonged as they know in the Chournos and Morrell cases to whom the lands and forage belonged which are owned and controlled by these Petitioners. While the Government's agents were undoubtedly committing an act for the benefit of the Government in the execution of the Taylor Grazing Act or of regulations promulgated by the Secretary of the Interior, they failed to exercise "due care" as the first portion of Section 2680(a) of the Tort Statutes requires. In the *Hatahley* case, the Court pointed out that "due care implies at least some minimal concern for the rights of others." Here, the agents proceed with complete disregard for the property rights of the petitioners, managing the livestock of third parties upon the lands of petitioners, collecting and keeping the fees charged the third parties for petitioners' forage.

As to the extent of the "discretionary function" exception, see Notes, 34 Texas L. Rev. 956 (1956), 25 Fordham L. Rev. 167 (1956), which states:

> "the duty to act is inconsistent with the choice of whether to act or not to act, possibly even at the executive level, and once that duty is found the discretionary exemption disappears."

In support of the trend developing through a line of decisions handed down by this Court, beginning with the *Indian Towing Co.* case, supra, reference is made to *Muniz vs. United States*, 374 U.S. 150, handed down by this Court in 1963. In that case, separate actions were instituted by two Federal prisoners under the Federal

Tort Claims Act for personal injuries sustained as a result of alleged negligence of prison employees. The District Court granted the Government's Motion to Dismiss for failure to state a claim, relying upon the said "discretionary function" exception.

The plaintiffs appealed and the lower court's decision was reversed. On certiorari, this Court, considering both cases together, held that suits against the United States by Federal prisoners to recover for personal injuries sustained during confinement in prison by reason of negligence of Government employees are within the purview of the Federal Tort Claims Act. The *Muniz* case seems to personify the present-day trend of the Court's interpretation of the said Section 2680(a).

The factual situations in the Chournos and Morrell cases here involved are closely analogous to the factual situations of the cases decided by this Court, heretofore discussed. To the extent that the court below denies any recovery to petitioners, if it is determined that the Government's act of issuing the permits and managing the livestock on petitioners' lands was within the scope of the "discretionary function" exception, as set forth in Section 2680(a), still it is error for the court below to conclude that after the agents decided to issue the permits, no duty or obligation was owed to the private landowners here involved.

The court below, in its opinion, has conceded that the Government agents acted with knowledge that trespass would inevitably result, and that the agents collected and kept fees for the use of forage taken from petitioners' lands, while they were denied use of the area

of range while it was being grazed by these other livestock operators. The permits were issued to third parties, who owned no lands within the areas involved.

It must be concluded that the Government agents have acted with forethought and intent and in complete disregard as to the rights of the petitioners. The Government agents, in the instant cases, not only took it upon themselves to determine who was to graze the intermingled public domain, but determined who was to graze the intermingled privately controlled lands of petitioners as well, while at the same time denying petitioners any grazing use within the areas involved, having previously rejected petitioners' offers to exchange use, as provided for in the Federal Range Code.

The decision below should be reversed by this Court and it should be found that once the Government agents had decided to issue permits, the acts of discretion falling within the ambit of Section 2680(a) ceased, and as of that time, a duty to exercise reasonable care was owed to the petitioners to see that trespasses did not occur. *This duty was breached by the Government agents when they intentionally aided and abetted the trespasses which did occur upon the privately owned lands of petitioners to their substantial detriment.* The court below either failed to see or completely disregarded the trend of law which is developing regarding Section 2680(a) of the Federal Tort Claims Act, which is illustrated by the above discussed decisions, handed down by this Court, beginning with *Indian Towing Co.*

III

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.

In the case of *Union Trust Co. of District of Columbia, et al vs. United States*, 113 F. Supp. 80, 221 F.2d 62 (1955), the Court said:

> "When the Government, as here, takes upon itself the function . . . of the regulation of air commerce and the responsibility, among other things, of regulating the flow of traffic at a public airport, the assumption of such a responsibility involves something further; namely, not only an activity designed to be protective of the interest of the amorphous group known as the public as a whole, but that of individuals as well against potential hazards incident to such performance and implicit in its undertaking. If injury or death results as a consequence of the negligence of its servants or agents so engaged, Congress has decreed that the mantle of sovereignty which heretofore has protected it, falls from its shoulders and thus what was formerly at best an unenforceable moral obligation is thus transmuted into an actionable legal right and whatever exceptions there are, this is not one of them."

This case involved a suit against the United States for wrongful death of airplane passengers resulting from a collision with another plane while the passenger plane was attempting to land at the public airport. The Government agent in the control tower was negligent.

In *Pierce vs. United States*, 142 F. Supp. 721 (DCED Tenn. 1955), 235 F.2d 466, an action was brought against the United States under the Tort Claims

Act, for injuries sustained by a lineman in an electrical accident at a Government ordinance works. The District Court held that the Government had breached a non-delegable duty, under Tennessee law, when it failed to take adequate precautions to avoid injury to the lineman. The Court stated:

> "Once the decision was made to construct substations and bring in power, all of the discretion required had already been exercised. *Thereafter it became the duty of the Government and its agents and employees to exercise due care in carrying out the program decided upon.*" (Emphasis supplied.)

The District Court decision was affirmed by the Circuit Court upon appeal by the United States.

The present-day trend, as exemplified by the above-cited decisions, is further supported by *Fair vs. United States,* 234 F. 2d 288 (5th Circuit), and *American Exchange Bank of Madison vs. United States,* 257 F.2d 938 (7th Circuit 1958).

The above decisions follow a closely analogous decision rendered by the South District of New York, in the case of *Rufino vs. United States,* 126 F. Supp. 132. The Court there stated:

> "Once the decision is made to submit a patient to treatment, the discretionary function ends and a duty of care is owed, the breach of which will subject the government to liability."

The factual situations in the Chournos and Morrell cases are closely analogous to the factual situations existing in the above discussed decisions. Since the agents of the Government in charge of issuing grazing permits

were under no less an obligation than that owed by the Government agents in the above cases, the decision in the court below is in conflict with these decisions of other circuit courts.

It should be found that once the decision had been made to issue grazing permits, the discretionary function ended and as of that moment, through the exercise of the Governmental managerial capacity of the public domain, as vested in them by the Taylor Grazing Act, a duty of care was owed to the petitioners, the parties in control of the intermingled private lands here involved.

IV

THE DECISION BELOW WAS ARRIVED AT THROUGH AN ERRONEOUS INTERPRETATION AND COMPARISON OF PARTICULAR FACTUAL SITUATIONS OF CASES ALREADY FINALLY ADJUDICATED BY THE CIRCUIT COURT OF APPEALS OF THE 10TH CIRCUIT.

The decision below holds that the rule, as set forth in *Oman vs. United States*, 179 F.2d 738 (10th Circuit), is not applicable here. In the *Oman* case, they had acquired property which qualified for the grazing use of public lands. After their acquisition of the qualifying privately owned range land, the agents of the Bureau of Land Management nevertheless continued to extend grazing privileges for the use of public land to the party who had formerly controlled the lands acquired by the Omans. It was not possible for this said predecessor

to graze the public lands without grazing the Oman privately owned lands. In connection with this particular issue, the Court had this to say:

> "It may also be that the regional grazier had the discretionary authority to refuse to issue grazing permits to transferees of base property, but, if so, the transferees were entitled to procedural safeguards which apparently were not afforded them in this case. Moreover, the gist of this aspect of plaintiffs' action is the refusal to cancel the old permits and not the refusal to issue new ones, and as to that, the regional grazier would appear to have no discretion."

It seems that the interpretation here of that rule, as set forth by the court below, would limit its applicability to the particular factual situation as existing in the *Oman* case. It is error for the court below to so narrowly construe the scope of that interpretation, and further, it seems that they have lost sight of the principle that was involved in the *Oman* case.

Though the facts differ, the issue involved is the same. That is, whether the Government, acting through its agents, can initiate a situation, when it is known at the time of such initiation that damage will inevitably be suffered by private landowners, and at the same time, refuse to provide procedural safeguards to the private landowners who will inevitably incur damage to their substantial detriment.

In the *Oman* case, it was found that the Government agents had a duty to provide proper procedural safeguards. The Government agents in the Chournos and Morrell cases were under no less an obligation. The Court should find that it was the duty and obligation

of the agents and officers of the Bureau of Land Management, particularly when they were specifically advised and knew of the ownership and control of these lands by Chournos and Morrell, to cancel or amend the licenses theretofore issued to those other livestock operators within the areas involved, and not to continue to issue to them the same licenses as were issued theretofore, when the Government had the control and use thereof.

The court below erroneously applied, to the Chournos and Morrell cases here involved, the interpretation of Section 2680(a) as set forth in the *Chournos vs. United States*, 193 F. 2d 321 (10th Circuit) and *Powell vs. United States*, 233 F.2d 251 cases.

The *Chournos vs. United States* case, supra, involved a situation wherein the Government had been granted control of the Chournos patented and leased lands through an exchange-of-use arrangement, as provided for under the Federal Range Code. In the cases now before the Court, the Government had no control whatsoever of the Chournos or Morrell lands, having refused to accept any control of these lands or to allow petitioners any use of the range areas to compensate them for the forage their lands produced. This difference is vital. In the cases now before the Court, the Government was collecting fees for the grazing of the lands of petitioners with no right to use these lands.

In the *Powell vs. United States* case, supra, a situation existed where the Bureau of Land Management had promulgated a regulation directing that grazing licenses be issued under the Taylor Grazing Act to third

parties for the grazing of the surface of mining claims, which had not yet gone to patent, and to deny the grazing use of the surface of those claims to the locator or equitable owner except as the surface was required in actual mining operations. The property involved in the *Powell* case was property of the United States, so far as the legal title was concerned, thus the Government still had some control over these lands until they went to patent. No mining claims are here involved nor does the Government have any degree of ownership or control of either the Chournos or Morrell lands.

The lower court, in relying upon *Kunzler vs. United States*, 208 F. Supp. 79, 307 F.2d 511 (10th Circuit), for support of its ruling, erroneously applied the principle as set forth in this case. The area involved in the *Kunzler* case was enclosed by a fence. This fence enclosed the checkerboard lands in the same land pattern, same county, and in the same general vicinity as the Chournos lands. However, in that case, the other livestock operators involved owned far more of the checkerboard lands than was owned by Kunzler. The other operators in that case were able, in a practical cattle operation, to graze the lands they owned and the intermingled public domain lands interspersed within their own holdings without making any use of the Kunzler lands. Further, Kunzler had refused to surrender his lands under an exchange-of-use arrangement although the Government offered him the opportunity to do so. In the Chournos and Morrell cases, now before the Court, the other operators owned no lands nor waters upon which their livestock could graze within the areas involved, and there was no possibility that the cattle in

the Chournos and Morrell cases could graze the public domain without grazing the Chournos and Morrell lands. Further, the Government not only totally rejected exchange-of-use offers, made by each of the petitioners, but then appropriated the use of their privately controlled lands for third parties, to petitioners' substantial detriment.

V

THE DECISION BELOW IS IN CONFLICT WITH UTAH LAW.

In Utah, one who lawfully grazes public lands is liable for damages in trespass for an incidental use of intermingled privately owned lands, even where the privately owned lands comprise less than one-tenth (1/10th) of the area and the public domain makes up more than nine-tenths (9/10ths) of the area. *Winters vs. Turner*, Utah 1929, 278 P. 816. The owner of cattle who willfully turns them onto the land of another without his consent is liable. *Jones vs. Blythe*, 33 Utah 362, 93 P. 994. This case involved land in the same checkerboard railroad land area as those lands of the petitioner, Chournos, in the case at bar, are located. See, also, *Mower vs. Olsen*, 49 Utah 373, 164 P. 482; *Hall vs. Bartholomew*, 51 Utah 279, 169 P. 943.

The decision of the court below declares the acts on the part of the agents of the Government, in intentionally placing livestock of others in the range areas here involved, after rejecting petitioners' offers to exchange use as provided for under the Federal Range

Code, with knowledge that trespass would inevitably and naturally result, and further, without having secured the permission of the petitioners so to do, to be acts of discretion within the ambit of Section 2680(a) of the Federal Tort Claims Act. After having placed these livestock of others in these areas, the Government assumed control of the areas and activities therein by managing and controlling the livestock operations within the entire areas, upon the lands of petitioners as upon the public domain.

The Government, by their act of extending permits to these third parties for the grazing of these public lands which the Government agents well knew could not be grazed without grazing petitioners' lands, are guilty in the same manner as if they had committed the act themselves. All persons who advise, instigate, aid, encourage, or direct a wrongful act are as liable as if they had performed the act themselves. *Roe vs. Lindstrom,* 89 U. 520, 57 P.2d 1128.

CONCLUSION

The Taylor Grazing Act authorizes the Secretary of the Interior to establish grazing districts. When the election has been made to establish a district, it is then the duty and obligation of the Secretary to manage and supervise the grazing use of the public lands by the livestock covered by the permits which the Secretary issues. Had the Secretary not included the lands involved here in a grazing district, he could have issued leases for the grazing use of the public lands, and would have had no further obligation as to how, or when, or with what class

of livestock the lessee might graze the leased public domain. But under the provision of the Taylor Grazing Act, authorizing such leases, 43 USC 315m, the owner of lands adjacent to the public domain to be leased are granted a preference as prospective lessees of that range. This same preference is granted to owners of adjacent grazing lands in the issuance of permits for the grazing of the intermingled public domain, which is included within a grazing district, 43 USC 315b.

This preference, however, the Secretary ignored when he refused to allow Morrell any use, under any arrangement, of the area of range within which the more than 25,000 acres of Morrell range was located. Similar disregard was had for the rights of Chournos. The total quantity of forage in the Chournos area is approximately 15,000 AUMs, 10,000 of which is produced upon the Chournos lands and the remaining approximately 5,000 grows upon the intermingled public domain. The Government allowed Chournos to enter the area with no more than 1,795 sheep to utilize, in six months, 2,154 AUMS, and to pay to the Government full grazing fees for all of the 2,154 AUMs as though all of the forage were being grazed by these animals from the public domain and none from the lands of Chournos. About one-third of the 2,154 AUMs of forage, or 718 AUMs, is all of which Chournos could secure from the public lands, by reason of the fact that the sheep are, two-thirds of the time, grazing the Chournos lands which make up two-thirds of the acreage. Further, Chournos is in the area only about one-half the time the Government fixes for his grazing, or for three of the six months. With this operation, Chournos could consume from the

Government land only about 359 AUMs, but was required to pay the Government for 2,154 AUMs, and denied any value of his own lands. Although the Chournos lands would supply him with feed for 10,000 head of sheep for five months, the Government denied him entry into the area with more than 1,795 sheep and required him to pay to it a fee for all forage his small number of livestock consumed from the area. The very substantial Chournos holdings were rendered valueless to him, and the Government took over their use and management.

Chournos should have been allowed to graze 10,000 head of sheep for five months, or 10,000 AUMs, or a greater number of sheep for a shorter period of time, without paying any fee whatsoever to the Government, because he was furnishing this quantity of forage to the general use of the livestock grazing this range. Chournos was not permitted to graze the area to any extent, with any livestock, without paying grazing fees to the Government. He was required to pay approximately three times the regular grazing fee for the forage his livestock consumed from the area because his 1,795 sheep were grazing his own lands two-thirds of the time. Not only was Chournos denied any use or value of his own 90,000 acres of range land and the 10,000 AUMs of forage it annually produced, but he was penalized by the Government for owning it.

While the Government was charging Chournos a triple fee for one-third of the forage it was furnishing to the limited 1,795 sheep, which was all the livestock it would allow Chournos to bring into the area, and with

no control whatsoever over the Chournos lands, it directed others to graze this area who contributed no forage thereto. The Government charged these third-party cattlemen for all the forage their livestock consumed from the area, as it did with Chournos, collected fees from said third parties for all the forage their cattle consumed, two thirds of which belonged to Chournos. The Government collected fees from these cattle operators for approximately 6,600 AUMs of forage, which they consumed from the Chournos lands. While denying Chournos any use of his own forage, the Government readily, without Chournos' permission, granted it to others and collected and kept the fees it charged for that forage.

Morrell found himself in almost the identical situation which prevailed with Chournos, except that the Government would allow Morrell to make no use whatsoever of the area and then, for the same season as Morrell desired to graze, it sold all of the forage in the entire range area, including that leased by Morrell which was sufficient to graze 400 cows and their calves, to third parties, and collected and kept the fees for the grazing of Morrell lands as it did with Chournos.

It is submitted that such actions on the part of the Government agents was a discrimination against Morrell and Chournos so palpable as to constitute a denial of equal protection of the laws. It amounted to the taking of private property without due process, with no compensation to Chournos and Morrell and substantially damaging each of these long-established, large livestock operations, each of which required their own forage for their own livestock.

If any discretion exists after a grazing district is established but before grazing permits are issued, that discretion would seem clearly to no longer exist after the permits to graze the area therein are issued. The Bureau of Land Management cause the livestock to be brought into the range to graze thereon according to their instructions and supervision. The grazing of the lands of petitioners under the permits was not an unexpected and unforeseeable happening. It was certain to happen. It was intended that it should happen. In the Chournos area, the cattle entered through gates directly upon the Chournos lands. In the Morrell area, there were no fences, but the livestock could not distinguish the Morrell lands from the adjacent public domain. This turning the livestock covered by the permits to graze petitioners' lands amounted to willfully aiding and abetting a trespass thereon. Not only was no care exercised by the Government officers to see that no use was made of the lands of petitioners, but said officers managed their lands as though they were public domain. Many more livestock were allowed by said officers to graze the areas than the total forage of the public lands would support. Such acts rendered the lands of petitioners totally valueless.

The Taylor Grazing Act invested patented range and ranch lands with an attribute which gave to the owner certain qualifications for the use of public domain, and gave a preference for the grazing use of public lands to the owner of adjacent lands and waters a "proper use" of which required the use of the public domain. In other words, the owners of patented lands and waters were granted rights to the use of public

domain. These became valuable property rights, *Red Canyon Sheep Company vs. Ickes,* (CA DC) 98 F.2d 308. In the cases at bar, the Government is taking action as though the Government lands are vested with some power to take over the use of the adjacent privately owned lands and waters, and without regard to the wishes of the owners of these properties.

No discretion existed to intentionally bring about the grazing of the lands of petitioners. Such use of petitioners' lands under the plan designed and followed by the agents of the Government totally destroys all value of the very substantial lands of petitioners, because they are valuable only in the grazing of livestock.

The court below sanctioned this conduct on the part of Government agents, on the theory that if the Government did not pursue this action, the petitioners would be in a position to secure licenses to graze the public domain. It is submitted that the Taylor Grazing Act, supra, clearly intended that such owners of land and waters as petitioners would be given a preference for the particular public domain which they must graze in order to make a "proper" use of their lands and waters. The Government recognizes this preference for the cattlemen involved in the Chournos area, by extending to them the exclusive use of the public domain adjacent to and intermingled with their holdings which are located directly north of the Chournos' holdings and from which area, they totally excluded Chournos because he would have to trespass upon the lands of the cattlemen to graze the public domain intermingled therewith. Petitioners are not nonresident owners of privately owned

lands who seek to freeze or obstruct the use of the public domain. They desired to, applied for, and required the use of the public domain in carrying on their own sizeable year-long operations.

To sanction the decision of the court below would be to give new life to those portions of such concepts as "Sovereign Immunity" and "The King Can Do No Wrong," which it was the purpose of the Federal Tort Claims Act to abrogate for the purpose of providing a remedy, recoverable at law, where before only a moral obligation, at best, was owed.

It is a curious anomaly that, in a country which prides itself in having a government "by the consent of the governed," we should be bound by such doctrines as "The King Can Do No Wrong." "However, it is fairly easy to postulate that liability should not extend to the consequences of a legislative or executive decision of a political nature, and that the propriety of such decisions should not be subject to judicial review." [1] However, to carry the concept of immunity provided by the "discretionary function" exception, as provided for in Section 2680(a) of the Federal Tort Claims Act, to such an absurd extreme as the Circuit Court of Appeals has done in the Chournos and Morrell cases would be to permit coercion promulgated by Government officials which is inconsistent and out of step with modern political thought and contemporary public opinion.

"It is frequently maintained that although precedent has its place, society is entitled to progress. If the

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[1] James, "Inroads on Old Tort Concepts," 15 NACCA L.J. 281, 290 (1955)

two claims conflict, either the courts or the legislature must, as the situation demands, accept the challenge and make a decision." [2] In light of the purpose behind the Federal Tort Claims Act, and further, in view of the trend which is developing as exemplified through decisions handed down by this Court, various circuit courts and district courts, the decision of the court below should be found to be in error.

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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Attorney for Petitioner

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[2] Cardozo "The Paradoxes of Legal Science," (1928) p. 3

APPENDIX

STATUTES AND REGULATIONS INVOLVED

A. Federal Statutes

The Taylor Grazing Act of June 28, 1934, C. 865, 48 Stat. 1269, as amended, 43 U.S.C. Secs. 315 et seq., provides in pertinent part as follows:

Section 2, 43 U.S.C. Sec. 315a.

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of Section 1 of this Act. (Section 315 of this title), and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act (chapter) and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * *

Section 3, 43 U.S.C. Sec. 315b.

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * * . Preference shall be given in the issuance of grazing permits to those within or near a

district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water right, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them, * * * .

43 U.S.C. Sec. 315m. Lease of isolated or disconnected tracts for grazing; preferences.

The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to sections 315-315m, 315n, 315o and 315o-1 of this title, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: Provided, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. Provided further, That when public lands are restored from a withdrawal, the Secretary may grant an appropriate preference right for a grazing lease, license, or permit to users of the lands for grazing purposes under authority of the agency which had

jurisdiction over the lands immediately prior to the time of their restoration. June 28, 1934, C. 865, Sec. 15, 48 Stat. 1275, as amended June 26, 1936, c. 842, Title I, Sec. 5, 49, Stat. 1978; May 28, 1954, c. 243, Sec. 1, 68 Stat. 151.

PART 161 — THE FEDERAL RANGE CODE FOR GRAZING DISTRICTS

Sec. 161.6(c) Exchange of use licenses. Exchange of use licenses may be issued to any applicant having ownership or control of non-Federal lands interspersed and normally grazed in conjunction with the surrounding Federal range for not to exceed the grazing capacity of such non-Federal land, without payment of grazing fees, provided that during the term of the license the Bureau shall have the management and control of such non-Federal land for grazing purposes.

Sec. 161.11 - General rules of the range—(a) Acts prohibited. The following acts are prohibited on the Federal range:

(1) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

(2) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or

by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

(3) Constructing or maintaining any kind of improvements, structures, fences, or enclosures on the Federal range, including stock driveways, without authority of law or a permit.

(4) Destroying, molesting, disturbing, or injuring property used or acquired for use by the United States in the administration of Federal range, including stock driveways, or improvements constructed or maintained under Section 4 of the Act.

(5) Cutting, burning, or removing vegetative cover, brush, woodland growth, or timber for any purpose, except as authorized by law. Permits to carry on controlled burning of vegetative cover or brush may be issued by the District Manager in proper cases, subject to such conditions as he may impose, and to all State laws and regulations concerning such burning.

(6) Molesting or driving from the Federal range without authority livestock lawfully grazing thereon under license or permit.

(7) (b) Rules of fair range practice. All licensees and permittees shall comply with the following rules of fair range practice.

(1) The statutory provisions of the State in which the Federal range or stock driveway to be used is located relating to the branding of livestock and sanitary requirements shall be followed.

(2) A crossing permittee shall follow the route prescribed in the crossing permit at an average rate of not less than five miles per day for sheep or goats and ten miles per day for cattle or horses, but an increased or decreased rate of travel may be prescribed in the discretion of the District Manager.

(3) All licensees and permittees shall provide adequate salt on the range for their licensed or permitted livestock, and shall bed sheep and goats according to instructions issued by the District Manager. Upon request by the majority of the users of any community allotment of Federal range, the District Manager may prescribe the time for, breed, grade, and number of bulls to be turned into such allotment; in the absence of such express requirements the provisions of State law on the subject shall be applicable.

Sec. 161.12 Procedure for enforcement of rules and regulations.

A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit, or for a violation of the act or of any of the provisions of this part, or of any approved special rule.

Title 28 U.S.C.A.

Section 1346(b). Subject to the provisons of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclusive jurisdiction of civil ac-

tions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680 Exceptions:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.